ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's	)	
Broadcast and Cable	)	MM Docket No. 98-204
Equal Employment Opportunity	)	
Rules and Policies	)	
and	)	
Termination of the	)	MM Docket No. 96-16
EEO Streamlining Proceeding	)	

To: The Commission

COMMENTS OF NATIONAL RELIGIOUS BROADCASTERS

National Religious Broadcasters ("NRB") hereby submits its comments supporting the Commission's proposal in the above-referenced proceeding to "codify in [its] rules that religious broadcasters may establish religious belief or affiliation as a *bona fide* occupational qualification" for station employees.[1] NRB urges the Commission, however, to revise the

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[1] *See Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding (Notice of Proposed Rulemaking)*, MM Docket Nos. 98-204 and 96-16, FCC 98-305, ¶ 70 (rel. Nov. 20, 1998) ("Notice"). NRB is a national association of radio and television broadcasters and programmers whose purpose is to "foster and encourage the broadcasting of religious programming." National Religious Broadcasters, *Directory of Religious Broadcasting* 14 (1992-93). NRB members therefore are directly affected by Commission action in this docket and the related prior proceedings. Accordingly, NRB filed both comments and reply comments in MM Docket No. 96-16 urging the Commission to expand its so-called *King's Garden* exemption by permitting religious licensees to hire employees sharing the same

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agency's proposed definition of a "religious broadcaster" in order to appropriately encompass the full range of religious licensees now on the air.

As the *Notice* reflects, the Commission recently took action in its *EEO Streamlining* proceeding to revise its decades-old "*King's Garden*" exemption to the broadcast EEO requirements.[2] That limited exemption permitted religious broadcasters to establish religious faith as a *bona fide* occupational qualification ("BFOQ") for those employees who "espoused" the licensee's religious views on the air, but denied religious broadcasters the right to require that "non-espousal" employees—such as station secretaries or engineers—also share the licensee's religious views. At the urging of NRB and other commenters, the FCC last year issued an *Order and Policy Statement* expanding the exemption to allow religious broadcasters to establish religious belief or affiliation as a BFOQ for all station employees.[3]

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religious faith or beliefs for all station positions. *See* Comments of National Religious Broadcasters, MM Docket No. 96-16 (filed Apr. 30, 1996) ("NRB 1996 Comments"); Reply Comments of National Religious Broadcasters, MM Docket No. 96-16 (filed Oct. 25, 1996).

[2] *See In re King's Garden, Inc.*, 34 F.C.C. 2d 937 (1972), *aff'd sub nom. King's Garden v. FCC*, 498 F.2d 51 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974).

[3] *See Streamlining Broadcast EEO Rule and Policies, Vacating the EEO Forfeiture Policy Statement and Amending Section 1.80 of the Commission's Rules to Include EEO Forfeiture Guidelines*, MM Docket No. 96-16, FCC 98-19 (rel. Feb. 25, 1998) ("*Order and Policy Statement*"). The *Order and Policy Statement* made clear that religious licensees may not discriminate on the basis of race, color, national origin, or gender from among those who share their religious affiliation or belief—a position which NRB has consistently and wholeheartedly supported. *See, e.g.*, NRB 1996 Comments at 3, 14, 19-20.

The Commission now proposes to codify that policy change.[4] Thus, under the new rule, "[r]eligious broadcasters who establish religious affiliation as a bona fide occupational qualification for any job position would not be required to comply with specific recruitment requirements for that position, but would be expected to make reasonable, good faith efforts to recruit minorities and women who are qualified on the basis of their religious affiliation."[5] NRB fully supports this objective. Such an exemption reasonably accommodates the legitimate needs and desires of religious broadcasting organizations in ordering their internal affairs—including the need to ensure that employees share a common commitment to the licensee's views and mission. The exemption also avoid unnecessarily entangling the Commission in analyzing and categorizing the tasks performed by various employees of religious licensees.

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[4] The proposed rule would specifically apply only to radio station licensees. *Notice* at ¶ 70. The Commission intends to continue to treat television station licensees under the *Order and Policy Statement* "due to the limitations imposed by Section 334." *Id.* NRB does not address the issue of whether the FCC has power to explicitly change the rule for TV licensees—but notes that because the EEO rules were found unconstitutional, the agency has no authority to enforce the old rule against television broadcasters in any case.

The *Notice* also states that the Commission in this proceeding will consider the petition for reconsideration filed by the American Center for Law & Justice ("ACLJ") on February 25, 1998, concerning the 1998 *Order and Policy Statement*. NRB already is on record as opposing that petition and therefore will not reiterate those arguments in detail here. *See* Opposition of National Religious Broadcasters to Petition for Reconsideration, MM Docket No. 96-16 (filed May 12, 1998) (rebutting ACLJ's argument concerning proper APA notice of the policy change with respect to religious broadcasters by showing that the FCC action was a "logical outgrowth" of the agency's 1996 Notice in the *EEO Streamlining* proceeding). Nonetheless, it should be apparent that this *Notice* eliminates any possible concern over whether interested parties receive proper notice of, and an opportunity to comment on, the proposed religious exemption.

[5] *Notice* at ¶ 71.

However, the *Notice* proposes an unnecessarily restrictive definition of a "religious broadcaster" who would qualify for the exemption. By limiting the definition to "a licensee that is, or is closely affiliated with, a church, synagogue, or other religious entity, including a subsidiary of such an entity," the Commission's current proposal would deny a substantial number of long-time religious broadcasters—many of whom are NRB members—the benefit of the rule change. NRB estimates that approximately 40% of its member stations are not affiliated with a specific church or denominational entity.[6] Yet many of these stations fill much, if not all, of their airtime with religious programming, identify themselves as religious broadcasters, and subscribe to the NRB Doctrinal Statement. It would be constitutionally unseemly, to say the least, for the Commission to deny such licensees the same right as church-affiliated licensees to hire employees on the basis of religious faith.[7] Furthermore, such distinctions would be impermissible under the Religious Freedom Restoration Act ("RFRA").[8]

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[6] Moreover, the Commission's proposal that the licensee be "closely affiliated" with a church or other religious entity is vague at best with respect to the degree of affiliation required.

[7] Relying only on a church-affiliation standard could put the FCC in the position of evaluating the sincerity of a non-affiliated licensee's religious beliefs—or even discriminating between adherents of well-established religious denominations and those of recently formed communities of faith. *See also Notice* at ¶ 71 (proposing to consider whether a religious entity has "a distinct religious history").

[8] RFRA bars the federal government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). A regulation may survive only if the government regulator can demonstrate that the particular burden placed on the exercise of religion (1) furthers a compelling governmental

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While the *Notice* provides for an alternative, case-by-case inquiry into a particular licensee's status as a religious broadcaster, some of the factors that the Commission proposes to consider are not appropriate in the context of religious broadcasting. For example, the proposed inquiry into the broadcaster's status as a profit or non-profit entity is not a sound basis for determining the genuineness of its religious status. A very large number of long-time religious broadcasters operate on a commercial basis. Indeed, NRB estimates that approximately 50% of its member stations are run as for-profit entities. This should not be surprising; religious stations receive no public funding from government entities such as the Corporation for Public Broadcasting and often operate independently of a relatively well-endowed parent such as a church, seminary, or other established religious institution.[9]

Similarly, the *Notice* also proposes that the Commission consider whether a licensee has "a distinct religious history" in determining its eligibility for the religious exemption. This factor is troubling on several counts. First, it is too vague to give the agency's staff any legitimate guidance in a particular case. But even if it were not, this factor would place the

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interest, and (2) is the least restrictive means of furthering that compelling interest. 42 U.S.C. § 2000bb-1(b). Here, of course, the sometimes knotty analysis triggered by a rule of general applicability would *not* come into play—for the Commission's proposed rule specifically addresses religious beliefs and practices. Under the remainder of the statutory analysis, it is difficult to see how the FCC could demonstrate that it has a compelling interest in denying to non-affiliated religious entities the same accommodation afforded to church-affiliated ones.

[9] Nor is there any binding legal precedent under the analogous Title VII religious exemption on which to justify barring a for-profit religious broadcaster from making use of the religious EEO exemption.

Commission at grave risk of discriminating between those religious entities that it deemed sufficiently established and those it would dismiss solely on the basis of longevity. The federal government has no business making such distinctions, which would raise First and Fifth Amendment issues as well as colorable claims under RFRA.

NRB respectfully suggests that the better—and more constitutionally sound—approach to the definition question is to establish a simple, bright-line test. Accordingly, the FCC should revise the last sentence of the proposed Section 73.2080(a) to read as follows:

> For the purposes of this rule, a religious broadcaster is a licensee that
>
> (1) is, or is closely affiliated with, a church, synagogue, or other religious entity, including a subsidiary of such an entity; or
>
> (2) sets forth a religious purpose in its articles of incorporation, partnership agreement, or similar organic documents; or
>
> (3) devotes a majority of its airtime to religious programming.

NRB believes that the three subsections of this suggested revision, when applied to the current universe of religious broadcasters, will capture essentially all entities that would legitimately require station employees to share the same religious beliefs. At the same time, the suggested revision also offers the Commission's staff simple lines of demarcation that should be relatively easy to implement—thereby helping the staff avoid subjective, and constitutionally problematic, decision-making.

Subsection 1 of this suggested revision incorporates the FCC's own proposed language verbatim. As noted above, this language—when standing alone—fails to accommodate the

range of religious broadcasters now operating.[10] However, NRB recognizes the Commission's need for simple, bright-line measures to identify religious broadcasters for EEO purposes, and affiliation with a church or other religious entity can be one of several appropriate tests.

Subsection 2 of NRB's suggested revision is an adaptation of one of the FCC's own case-by-case factors. (The language is clarified slightly, however, in order to accommodate those religious licensees who are organized in forms other than a corporation.) NRB urges the Commission to elevate this "stated religious purpose" factor to the level of a bright-line test. It would be simple to administer and therefore effectively extricate the agency's staff from impermissible entanglements in a religious broadcaster's ordering of its faith-based internal affairs. And unlike several of the more problematic case-by-case factors outlined in the *Notice*, the stated religious purpose test goes to the heart of the issue at hand—the religious basis upon which the licensee conducts its operations.

Subsection 3 of the suggested revision is crafted to encompass any remaining religious broadcaster who does not qualify for the EEO exemption under the other subsections. By focusing on amount of airtime that the licensee devotes to religious programming, the FCC rule would comport with a commonsense understanding of how to identify a religious broadcaster.[11] Listeners obviously recognize that a station is religious if its broadcasts consist

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[10] *See supra* notes 6-8 and accompanying text.

[11] As the suggested language implies, it would be reasonable to define a religious broadcaster as one who devotes at least 51% of its airtime to religiously oriented programming. And while it could be a matter of some debate as to whether certain programs aired by religious broadcasters are "religious," NRB submits that these would be so few in

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mostly of such programming, much as they identify other stations—particularly in radio—by programming they generally air: news, talk, oldies music, country music, etc. Moreover, this focus on religious programming would be consistent with precedent under the analogous Title VII religious exemption, where—in the rare case dealing with an entity lacking either affiliation with a religious institution or a stated religious purpose in organic corporate documents—courts have considered whether the "product" of the entity in question is religious or secular.[12] Finally, failure to exempt stations that air mostly religious programming but do not qualify under the other criteria could put the FCC staff back into precisely the situation that the agency's *Order and Policy Statement* seeks to avoid: having to categorize station jobs on the basis of how directly they are connected to the religious messages broadcast.

Accordingly, the Commission should modify its definition of a "religious broadcaster" for the purposes of the religious exemption to the agency's proposed EEO rules. By affording licensees who air mostly religious programming the same right to establish religious belief as a BFOQ for all station employees as that accorded to broadcasters affiliated with churches and other religious entities, the new FCC rule would provide appropriate scope for religious

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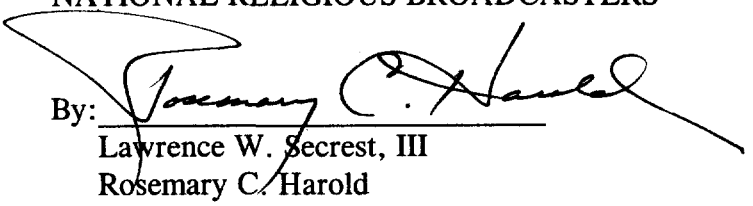
number—and likely would constitute such a small percentage of overall programming broadcast—as to make it highly unlikely that such programs would be a decisive factor.

[12] *See EEOC v. Townley Engineering & Manufacturing Co.*, 859 F.2d 610, 619 (1988).

broadcasters—whatever their organizational form—to order their internal affairs in accordance with their faith.

Respectfully submitted,

NATIONAL RELIGIOUS BROADCASTERS



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